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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

DONALD E. FARRAR, et al.,
Petitioners,

VS.

FRANCHISE TAX BOARD,
Respondent.

On Petition For Writ Of Certiorari to the California Court of Appeal, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State violates the Supremacy Clause when it imposes a tax-refund procedure which, by effectively prohibiting class-wide relief, deprives the Federal Government's investors of the means to redress the injury that an unlawful state tax has inflicted on the market for United States obligations?

PARTIES TO THE PROCEEDING

Petitioners are Donald Farrar, individually and on behalf of all others similarly situated, and Joan Farrar, his spouse. Below, petitioners moved to certify a class defined as follows:

> "All individual and corporate shareholders of the Capital Preservation Fund and the Capital Preservation Fund II and all beneficiaries of the Capital Preservation Treasury Note Trust who paid California income tax or incurred California income tax liability on distributions which they received from one or more of those three entities during one or more of the years 1982, 1983, 1984 and/or 1985."

Respondent is the Franchise Tax Board, an agency of the State of California.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Prologue: The Brown Litigation	3
B. The Case At Bar	6
REASONS FOR GRANTING THE WRIT	7
A. The Decision Below Improperly Disregards An Important Federal Interest	9
B. The Decision Below Conflicts With This Court's Intervening Decision In *Harper*	14
CONCLUSION	22
APPENDIX:	
Opinion of California Court of Appeal	A-1
Superior Court's Second Order	A-12
Superior Court's First Order	A-14
Order of California Supreme Court Denying Petition for Review	A-15
Order Extending Time to File Petition	A-16
Declaration of David Hinman	A-17

TABLE OF AUTHORITIES

Cases

Page

American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983) 3

Andras v. Department of Revenue, 154 Ill. App. 3d 37, 506 N.E.2d 439 (1987), *cert. denied,* 485 U.S. 960 (1988) .. 4

Bass v. State, 302 S.C. 250, 395 S.E.2d 171 (1990), *cert. granted, vacated and remanded,* 111 S. Ct. 2881 (1991), *on remand,* 307 S.C. 113, 414 S.E.2d 110 (1992), *cert. granted, vacated and remanded,* 113 S. Ct. 3025 (1993) 15

Board of Trustees v. Sweeney, 439 U.S. 24 (1978) 17

Borg v. Department of Revenue, 308 Or. 34, 774 P.2d 1099 (1989) 4

Brown v. Franchise Tax Bd., 197 Cal. App. 3d 300, 242 Cal. Rptr. 810 (1987) 4

Cambridge State Bank v. James, 480 N.W.2d 647 (Minn. 1992), *cert. granted, vacated and remanded,* 113 S. Ct. 3026 (1993) 15

Capital Preservation Fund v. Department of Revenue, 145 Wis. 2d 841, 429 N.W.2d 551 (1988) 4

City of San Jose v. Superior Court, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974) 21

Comptroller of the Treasury v. First United Bank & Trust, 320 Md. 352, 578 A.2d 192 (1990) 4

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 11, 13, 16

Dean v. State, 250 Kan. 417, 826 P.2d 1372, *cert. denied,* 112 S. Ct. 2941 (1992) 14

Department of Employment v. United States, 385 U.S. 355 (1966) 10

Duffy v. Wetzler, 174 A.D.2d 253, 579 N.Y.S.2d 684 (N.Y. App. Div. 1992), *cert. granted, vacated and remanded,* 113 S. Ct. 3027 (1993) 15

TABLE OF AUTHORITIES

CASES

Page

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 13, 19

Farrar v. Franchise Tax Bd., 15 Cal. App. 4th 10, 18 Cal. Rptr. 2d 611 (1993) 1

Felder v. Casey, 487 U.S. 131 (1988) 18

First Nat'l Bank v. Bartow County Bd. of Tax Assessors, 470 U.S. 583 (1985) 9

Guenter v. Lomas & Nettleton Co., 140 Cal. App. 3d 460, 189 Cal. Rptr. 470 (1983) 6

Hagge v. Iowa Dep't of Revenue & Fin., 504 N.W.2d 448 (Iowa 1993) 18

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) ..... *passim*

Harper v. Virginia Dep't of Taxation, 241 Va. 232, 401 S.E.2d 868, *vacated*, 111 S. Ct. 2883 (1991) 14, 15

Hogan v. Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, 112 S. Ct. 867 (1992) 19

Howlett v. Rose, 496 U.S. 356 (1990) 18, 19, 21

In re Thomas C. Sawyer Estate, 149 Vt. 541, 546 A.2d 784 (1987) 4

Lattin v. Franchise Tax Bd., 75 Cal. App. 3d 377, 142 Cal. Rptr. 130 (1977) 21

Lowenstein v. State, 244 Neb. 82, 504 N.W.2d 800 (1993) 4

Matz v. Department of Treasury, 155 Mich. App. 778, 401 N.W.2d 62 (1986) 4

McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990) ..... *passim*

Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) 3, 9, 11

Milliken v. United States, 283 U.S. 15 (1931) 21

New York v. Cathedral Academy, 434 U.S. 125 (1977) ... 7

TABLE OF AUTHORITIES

CASES

Page

Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 112 S. Ct. 867 (1992) 19

People v. Commissioners of Taxes & Assessments, 67 U.S. (2 Black) 620, 17 L. Ed. 451 (1862) 9

Perez v. Campbell, 402 U.S. 637 (1971) 18

Rockford Life Ins. Co. v. Illinois Dep't of Revenue, 482 U.S. 182 (1987) 9

Santa Barbara Optical Co. v. State Bd. of Equalization, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (1975) 21

Schoderbek v. Carlson, 113 Cal. App. 3d 1029, 170 Cal. Rptr. 400 (1980) 21

Sheehy v. Montana Dep't of Revenue, 250 Mont. 437, 820 P.2d 1257 (1991), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993) 12, 15

Sizemore v. Rinehart, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed*, 611 So. 2d 1069 (Ala. 1993) 20

Smith v. Davis, 323 U.S. 111 (1944) 9

State v. Quill Corp., 500 N.W.2d 196 (N.D.), *cert. denied*, 114 S. Ct. 173 (1993) 19

Stephen v. Enterprise Rent-A-Car, 235 Cal. App. 3d 806, 1 Cal. Rptr. 2d 130 (1991) 6

Swanson v. State, 329 N.C. 576, 407 S.E.2d 791, *reh'g granted*, 330 N.C. 390, 410 S.E.2d 490 (1991), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993) 15

United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2888 (1991) 10

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 11

Welch v. Henry, 305 U.S. 134 (1938) 21

Weston v. City Council, 27 U.S. (2 Pet.) 449, 7 L. Ed. 481 (1829) 9

TABLE OF AUTHORITIES

CASES

Page

Woosley v. California, 3 Cal. 4th 758, 838 P.2d 758, 13 Cal. Rptr. 2d 30 (1992), *cert. denied*, 113 S. Ct. 2416 (1993) 12, 13, 17

Yurista v. Commissioner of Revenue, 460 N.W.2d 24 (Minn. 1990) 4

Zarda v. State, 250 Kan. 364, 826 P.2d 1365, *cert. denied*, 112 S. Ct. 2941 (1992) 19

Constitutional Provisions

U.S. CONST.
art. I, § 8, cl. 2 2
art. VI, cl. 2 2
amend. XI 13

Statutes and Regulations

28 U.S.C.
§ 1257(a) 2
§ 1341 13
31 U.S.C. § 3124(a) 2, 3, 9, 10, 11
42 U.S.C. § 1983 18
CAL. REV. & TAX. CODE § 19055 ..... *passim*
IND. CODE ANN.
§ 6-6-1.1-910 14
§ 6-6-2.1-807 14
§ 6-6-4.1-7.1 14
§ 6-8.1-9-7 14
KAN. STAT. ANN.
§ 79-2005 14
§ 74-2426 14
N.J. STAT. § 54:49-14 14
S.C. CODE ANN. § 12-47-447 14

Other Authorities

E. J. FERGUSON, THE POWER OF THE PURSE (1961) 9
T. MERRILL, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597 (1987) 9

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PETITION FOR WRIT OF CERTIORARI

Petitioners Donald Farrar, individually and on behalf of all others similarly situated, and Joan Farrar respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First District, entered in this case on April 22, 1993.

OPINIONS BELOW

The opinion of the California Court of Appeal is published at *Farrar v. Franchise Tax Bd.*, 15 Cal. App. 4th 10, 18 Cal. Rptr. 2d 611 (1993), and reprinted in the Appendix to this Petition at App. A-1. The order of the California Supreme Court denying petitioners' Petition For Review is reprinted in the Appendix at App. A-15. The trial court's rulings on petitioners' two successive motions to certify the class and resolve class issues were not published. The ruling on the second motion is reprinted in the

Appendix at App. A-12, and the ruling on the first motion is reprinted in the Appendix at App. A-14.

JURISDICTION

The decision of the California Court of Appeal affirming the denial of petitioners' second motion to certify class and resolve class issues was entered on April 22, 1993. On July 15, 1993, the California Supreme Court denied a petition for review. By Order of the Honorable Sandra Day O'Connor, dated October 5, 1993, the time to file this Petition was extended to November 12, 1993. App. at A-16. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). *See* additional discussion of jurisdiction *infra* at p. 6, note 7.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, article VI, clause 2 ("Supremacy Clause") provides, in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any States to the Contrary notwithstanding."

2. The United States Constitution, article I, section 8, clause 2, provides:

> "The Congress shall have Power . . . To borrow Money on the credit of the United States. . . ."

3. 31 U.S.C. Section 3124(a) provides, in pertinent part:

> "Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax. . . ."

4. California Revenue and Taxation Code Section 19055, as amended in 1986, provides, in its entirety:

> "Every claim for a refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds upon which it is founded. A claim filed for or on behalf of a class of taxpayers shall do all of the following:
>
> "(a) Be accompanied by written authorizations from each taxpayer sought to be included in the class.
>
> "(b) Be signed by each taxpayer or taxpayer's authorized representative.
>
> "(c) State the specific grounds on which the claim is founded."

STATEMENT OF THE CASE

A. Prologue: The Brown Litigation.

Respondent Franchise Tax Board ("the Board") taxed distributions from three mutual funds ("the Funds")[1] which invested exclusively in obligations of the United States. An aggrieved taxpayer, Sandra Brown, on behalf of herself and all similarly situated taxpayers, filed a claim with the Board for the refund of all taxes so-collected between 1978 and 1981. She later brought a class action in the California Superior Court. In 1983, relying upon this Court's decisions in *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983), and *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), the Superior Court held that 31 U.S.C. Section 3124(a) prohibited the taxation of such distributions. In accord with the nationwide consensus on this

[1] The three mutual funds were plaintiffs below but were not parties to the appeal of the class certification ruling and do not join in this Petition. The Funds are the Capital Preservation Fund, the Capital Preservation Fund II, and the Capital Preservation Treasury Note Trust.

issue,[2] the California Court of Appeal affirmed. *Brown v. Franchise Tax Bd.*, 197 Cal. App. 3d 300, 242 Cal. Rptr. 810 (1987). In 1988, after the California Supreme Court denied review, the Board paid over $5 million in tax refunds to approximately 40,000 class members.[3] The average refund was $138.00.

Despite its complete success, the *Brown* case did not put an end to litigation over the Board's taxation of Fund dividends. During the five years between the Superior Court's ruling in *Brown* that the tax was illegal and the California Supreme Court's 1988 denial of review, the Board continued to collect the unlawful tax. Early in 1985, in the first of two affirmative steps to impede attempts by taxpayers to recover refunds of the tax for tax years later than those at issue in *Brown*, the Board distributed an internal bulletin directing its employees to respond to taxpayer questions pertaining to 1982 and subsequent tax years as follows:

> "Tell the Taxpayer 'the issue you raise is currently before the Superior Court in the class action suit *Brown et al., v. Franchise Tax Board.* Action on claims for refund raising this issue is being deferred until the case is decided and all appeals are exhausted. A considerable period of time could elapse before this occurs, and your patience in this matter is appreciated.' "

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[2] *E.g., Yurista v. Commissioner of Revenue*, 460 N.W.2d 24, 27-28 (Minn. 1990); *Comptroller of the Treasury v. First United Bank & Trust*, 320 Md. 352, 367, 578 A.2d 192, 199 (1990); *Borg v. Department of Revenue*, 308 Or. 34, 37-38, 774 P.2d 1099, 1101 (1989); *In re Thomas C. Sawyer Estate*, 149 Vt. 541, 543-44, 546 A.2d 784, 785 (1987); *Capital Preservation Fund v. Department of Revenue*, 145 Wis. 2d 841, 844, 429 N.W.2d 551, 553 (1988); *Andras v. Department of Revenue*, 154 Ill. App. 3d 37, 42, 506 N.E.2d 439, 443 (1987), *cert. denied*, 485 U.S. 960 (1988); *Matz v. Department of Treasury*, 155 Mich. App. 778, 784, 401 N.W.2d 62, 65 (1986). *See Lowenstein v. State*, 244 Neb. 82, 88, 504 N.W.2d 800, 804 (1993).

[3] The *Brown* class was potentially much larger than 40,000. However, only those class members who affirmatively opted *in* to the class received refunds, significantly reducing the magnitude of the State's liability.

This policy with respect to taxpayer inquiries remained in effect after the trial court in *Brown* entered its final judgment on June 27, 1986, ordering the Board to pay refunds to the plaintiff class. In April 1987, as the Board continued to counsel "patience" pending the completion of appeals in *Brown*, the statute of limitations on refund claims for 1982—the first tax year after those at issue in *Brown*—was about to expire.

The second of the affirmative steps the Board took to discourage refund claims for the post-1981 tax years came in 1986, when the Board persuaded the California Legislature to amend the notice-of-claim provision contained in Section 19055 of the Revenue and Taxation Code. The Board conceded, and the court below found, that the amendment to Section 19055 was adopted "in response to the *Brown* case." As the Board explained,

> "In the course of resolving the class action against the Board in *Brown*, the Board was required to expend an extraordinary amount of administrative effort and expense . . . in order to identify the class, notify and correspond with class members, evaluate their claims, and ultimately issue refunds. The Board's cost for the procedures required exceeded $1 million. [¶] In light of this, sometime after the class [in *Brown*] was certified, the Board drafted legislation to amend the claim filing requirements set forth in Revenue and Taxation Code Section 19055 . . . . [¶] The language which the Board drafted was eventually enacted into law in the amendments to Section 19055, effective September 22, 1986." (App. at A-17 - A-18)[4]

As construed by the court below, amended Section 19055 does not permit *any* taxpayer—not even an unnamed class member—to receive a refund without submitting a timely written

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[4] *See also* App. at A-2. In the trial court, petitioners objected that no competent evidence supported the Board's conclusory contention that the administrative cost of the class remedy in *Brown* "exceeded $1 million."

notice of claim.[5] Under the amended provision, a taxpayer must either submit that notice of claim directly to the Board, or else provide a "written authorization" that meets all of the requirements of a notice of claim to another taxpayer, who must then file that "written authorization" together with his or her own notice of claim.

B. The Case At Bar.

On April 10, 1987, less than seven months after the effective date of amended Section 19055, petitioners Donald and Joan Farrar filed an administrative claim for refunds on behalf of themselves and of all others who had paid California taxes on distributions received from any of the Funds in tax years 1982, 1983, 1984 and 1985. Petitioners did not attach authorizations of any class members but themselves to their notice of claim. When the Board failed to take any action on petitioners' refund claim even after the California Supreme Court had denied the Board's petition for review in *Brown*,[6] petitioners initiated this action in California Superior Court.

After the trial court denied petitioners' first motion for class certification without prejudice (App. at A-14), petitioners brought a second motion to certify the class. The trial court denied that second motion solely for failure to comply with amended Section 19055. App. at A-12.

On appeal,[7] the California Court of Appeal affirmed on the ground that amended Section 19055 "establish[ed] conditions to

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[5] The notice is required to be "in writing, . . . signed by the taxpayer or the taxpayer's authorized representative, and [to] state the specific grounds upon which it is founded." Cal. Rev. & Tax. Code § 19055.

[6] The Board's petition for review in *Brown* was denied on March 24, 1988. The Board did not seek review in this Court.

[7] California law recognizes an immediate right to appeal from an order denying a motion to certify a class; such appeal may not be deferred until entry of final judgment. *Stephen v. Enterprise Rent-A-Car*, 235 Cal. App. 3d 806, 811, 1 Cal. Rptr. 2d 130 (1991); *Guenter v. Lomas & Nettleton Co.*, 140 Cal. App. 3d 460, 465-66, 189 Cal. Rptr.

the availability of [a class] remedy" (App. at A-6) which petitioners had not met. It rejected petitioners' contention that, as applied to the vindication of the federal interests and rights at issue in this case, amended Section 19055 was preempted. The provisions of that Section, according to the court, served California's " 'exceedingly strong interest in financial stability' " (quoting *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 37 (1990)), and thus were "consistent with constitutional demands." App. at A-10. In reaching this conclusion, the court did not acknowledge the possibility that federal law can preempt state rules of procedure. Because *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), had not yet been decided in this Court, moreover, the decision below was not informed by a consideration of that case.

The California Supreme Court denied a petition for review on July 15, 1993. App. at A-15. Justice Mosk would have granted the petition. *Id.*

REASONS FOR GRANTING THE WRIT

This case raises issues of substantial importance to the United States Treasury. In violation of an implied constitutional and express statutory immunity, the Board collected a tax on obligations the Federal Government issues in order to fund the national debt. As this Court's cases have recognized, that tax depressed the market for those obligations; at the same time, it unjustly enriched the State. The question for the Court's decision is whether the Board must redress this injury to the Federal Govern-

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470 (1983). Accordingly, there will be no opportunity for further review in the California courts of the federal question presented here, nor will there be an opportunity to seek review of the federal issue in this Court upon entry of final judgment. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-82 (1975) (jurisdiction properly in this Court where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case"); *New York v. Cathedral Academy*, 434 U.S. 125, 128 n.4 (1977) (jurisdiction exists where "possible developments on remand" could not "remove or otherwise affect" the federal issue).

ment's capital market, or whether it may instead retain the overwhelming majority of the unlawful tax proceeds on the basis of a procedural rule that California erected for the express purpose of protecting its own treasury.

Last Term, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), this Court reaffirmed that the remedy for unconstitutional state taxation is governed fundamentally by *federal law*. *Id.* at 2519. A full refund is the *only* remedy that is sufficient under federal law where a State has imposed a tax like California's that federal law placed "beyond [its] power to impose." *McKesson*, 496 U.S. at 39. While this federal remedy vindicates the individual rights of injured taxpayers, its primary purpose in a case like this one is to redress the federal fisc which the unlawful state tax has invaded.

Granting refunds to the petitioners individually while denying relief to the class they seek to represent denies relief to the Federal Government's capital market, and thus offends the Supremacy Clause. The court below justified its denial of class-wide relief—the only relief that can redress the market injury inflicted by the State's tax—solely on the basis of the *cost* to the State of administering such relief. In effect, it elevated the fiscal interest of the State over that of the Federal Government.

Harper now makes it clear that the fiscal interests of the States, even when far more weighty than the interests the Board asserts here, are not sufficient to override the federal remedy for unconstitutional state taxation. Had *Harper* been decided a few months earlier, the court below would have had to conclude that the Board's interest in reducing the administrative cost of the market-wide relief to which the Federal Government is entitled did not justify a failure to afford that relief.

A. The Decision Below Improperly Disregards An Important Federal Interest.

1. The remedy petitioners seek grows out of the paramount federal interest behind 31 U.S.C. Section 3124(a),[8] an interest as critically important in the present era of untamed federal budget deficits as it was in the early days of the cash-strapped Republic.[9] First codified in 1862, the immunity afforded by Section 3124(a) serves to prohibit all state taxes which "adverse[ly] [a]ffect . . . the United States' borrowing ability" (*Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 190 (1987)), by "diminish[ing] in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 396 (1983) (quoting *Smith v. Davis*, 323 U.S. 111, 117 (1944)). *Accord, People v. Commissioners of Taxes & Assessments*, 67 U.S. (2 Black) 620, 17 L. Ed. 451, 455 (1862) (recognizing that the investor's liability to a tax imposed by the State "affect[s] the[ ] value [of the federal obligations] in the market, and [therefore affects] the free and unrestrained exercise" by Congress of its constitutional power to "borrow money on the credit of the United States").

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[8] That immunity statute is "principally a restatement of the constitutional rule" of implied intergovernmental tax immunity. *First Nat'l Bank v. Bartow County Bd. of Tax Assessors*, 470 U.S. 583, 593 (1985) (quoting *Memphis Bank & Trust*, 459 U.S. at 397). *See Weston v. City Council*, 27 U.S. (2 Pet.) 449, 467, 7 L. Ed. 481, 487 (1829).

[9] *E.g.* T. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 601 (1987) ("the Continental Congress . . . had accumulated an enormous public debt during the Revolutionary War"). From the beginning, moreover, Congress carefully protected the market for federal securities from even those actions that were in the short-term interest of United States itself. For instance, as early as 1790, Congress soundly rejected a motion to discriminate against speculators who had purchased federal obligations at a discount in the secondary market, fearing that such discrimination "would impair the government's credit." E. J. FERGUSON, THE POWER OF THE PURSE at 297-301 (1961).

Federal law is uncompromising in requiring the full refund of any tax that infringes this crucial federal immunity. The same strict remedial requirements do not extend to every unconstitutional state tax; thus, if the tax is invalid solely because it is "*discriminatory*, though otherwise within the State's power to impose" (*McKesson*, 496 U.S. at 34), the State "retains flexibility" in choosing the means by which to remedy its violation of federal law: either it may "award full refunds to those burdened by [the] unlawful tax" or it may "issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.' " *Harper*, 113 S. Ct. at 2519-20 (quoting *McKesson*, 496 U.S. at 40). But if, as in this case, the tax was altogether "beyond the State's power to impose" because the property or instrumentality taxed was itself cloaked with federal immunity, the State has "no choice" of remedy; there being no way to "cure [its] invalidity," the State must " 'undo' the unlawful deprivation by refunding the tax." *McKesson*, 496 U.S. at 39. *Accord, United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2888 (1991) (refund is the "only logical relief" for tax collected in violation of intergovernmental immunity). *See also Department of Employment v. United States*, 385 U.S. 355, 357 (1966) (affirming refund of taxes unconstitutionally collected from instrumentality of the United States).

2. In pursuing this refund remedy on behalf of all investors similarly situated, petitioners advance the interest of the Federal Government in maintaining an attractive market in United States obligations. California's tax unquestionably depressed that market by penalizing individuals who elected to invest in those obligations. The confidence of the market can only be made whole by means of a market-wide—that is, a *class*-wide—remedy. In other words, the federal interest will not be vindicated unless California's fiscal concerns are required to yield so that essentially *all* of the unlawfully-taxed investors can be made whole in this action.

The United States relies on the private market to make itself whole by obtaining the refunds that alone will fully redress the fiscal injury to the United States. Thus, Section 3124(a)'s immunity has historically been enforced through suits brought by private individuals, and this Court recently reaffirmed the long-

settled rule that these individuals have standing to bring such suits. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 814-15 (1989). But this is not to say that the satisfaction of any *particular* investor is tantamount to the vindication of the federal market interest. Although the State, by affording a refund of the unlawful tax to one or two individual investors, thereby satisfies its due process obligations to them, it does not vindicate the market interests of the United States unless it refunds substantially *all* of the tax proceeds. *See Memphis Bank & Trust Co.*, 459 U.S. at 396 (Section 3124(a) requires States to remedy "the *slightest* [diminution in] the market value or the investment attractiveness" of United States obligations) (emphasis added). Accordingly, California is not at liberty to erect rules of procedure that deprive investors of the means of procuring such market-wide relief.

California's notice-of-claim rule is detrimental to the maintenance of an attractive market for federal obligations for yet another reason. Protracted litigation is costly. Where, as here, the amount at stake for any one individual is far too low to justify the costs of enforcement,[10] the federal interest simply will not be vindicated unless the cost of enforcement can be shared.[11] Indeed, if enforcement costs cannot be shared, then tax laws like the one struck down in *Brown* will continue to be enforced indefinitely. Procedural devices which interfere with the ability of investors to pool their resources and effect economies of scale thus have the *direct* consequence of obstructing relief to the United States in cases like this one.

The interests of the United States are further disserved whenever an offending State, by erecting a procedural hurdle in the way of full, market-wide relief, succeeds in retaining the unjust proceeds of its tax. If permitted but once to contravene the

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[10] The average refund for the four-year period covered by the *Brown* litigation was less than $140. By contrast, prosecuting that litigation involved thousands of hours of effort over a period of six years.

[11] The class-action device is useful in this respect precisely because it facilitates "the spreading of litigation costs among numerous litigants with similar claims." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980).

market-remedy to which the United States is entitled, such a procedural obstacle will stand as a perpetual threat to the Federal Government's capital market, and a perpetual counter-incentive to the States, which are obliged to refrain from injuring that market.

3. Although required to vindicate the market interests of the United States at some unavoidable (but by no means prohibitive) cost to California, the court below enforced Section 19055 and thus reached a "result-oriented decision . . . for the purpose of protecting [the] State's coffers." *Sheehy v. Montana Dep't of Revenue*, 250 Mont. 437, 820 P.2d 1257, 1269 (1991) (Trieweiler, J., dissenting), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993). It ruled that no remedy was available to the thousands of California residents who were penalized for their investment in federal obligations because, in compliance with the Board's advice to be "patien[t]," they did not file timely notices of claim.[12] The filing of such claims was not necessary to put the Board on notice that these investors existed, and were entitled to refunds; its sole purpose, according to the Board, was to reduce the cost to the State of administering the refund.

Earlier, in *Woosley v. California*, 3 Cal. 4th 758, 838 P.2d 758, 13 Cal. Rptr. 2d 30 (1992), *cert. denied*, 113 S. Ct. 2416 (1993), the California Supreme Court had applied an analogous statute to deny a class remedy for a tax scheme that unlawfully discriminated against the owners of motor vehicles purchased outside of California. In *Woosley*, the State had (at least arguably) greater leeway to impose conditions on the federal remedy for its unlawful tax, because the tax there was unlawful solely because it was discriminatory, and not because it was imposed in violation of an

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[12] In many instances, no doubt, the amount at stake for an individual investor was so low as not to justify the time and expense of filing even a notice of claim or "written authorization." *See supra*, note 10. Finding that their investment rendered them liable to state tax, many such investors will simply have decided against investing in federal obligations in the future. Of course, their decision to drop out of the market is costly to the United States in the aggregate notwithstanding the small amount of their refund claims individually.

immunity expressly intended to protect the United States' treasury.[13]

Apparently emboldened by this Court's denial of *certiorari* in *Woosley* (see App. at A-8 - A-11 (citing and relying upon *Woosley*)), the court below has now gone the next step: it has applied California's notice-of-claim requirement to thwart market-wide relief where the State has directly enriched itself "at the expense of the federal treasury" (*Davis*, 489 U.S. at 815 n.4), despite the fact that the alleged $1 million administrative cost of remedying that encroachment will have *no* appreciable effect on the State's economic stability. In other words, by the simple expedient of altering its refund requirements, California has been rewarded with effective immunity from liability for the proceeds of an unquestionably improper tax[14] while the injury to the United States' capital market remains unredressed.

The decision below, if left to stand, threatens not only to leave that market injury unredressed, but also effectively to end private enforcement of immunity-doctrine rights, both in California and elsewhere. Because it is the only federal forum available to review the constitutional issues that arise in actions for the refund of a state tax,[15] this Court has "frequently . . . entertained cases [in which] a taxpayer who had brought a refund action in state court against the State asked us to reverse an adverse state judicial decision premised upon federal law." *McKesson*, 496 U.S. at 27 & n.8 (citing numerous cases). It should entertain this case because of its importance to the present and future well-being of the federal treasury.

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[13] Moreover, the aggregate cost of the refunds sought in *Woosley* could arguably have affected the State's financial stability. *See* 3 Cal. 4th at 766 (plaintiffs sought refunds in excess of $1 *billion*).

[14] *See supra*, note 2.

[15] Actions like this one generally must be brought in state court. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981); *see also* 28 U.S.C. § 1341 (tax injunction act); U.S. Const., amend. XI.

B. The Decision Below Conflicts With This Court's Intervening Decision In *Harper*.

1. If California can escape liability to the aggrieved taxpayers in this case, then any State, by enacting similar legislation,[16] can avoid providing relief to the federal retirees whose claims this Court addressed twice in four years, first in *Davis* and again, just last Term, in *Harper*. Such a result, however, would be plainly inconsistent with *Harper*'s emphatic holding that the fiscal interests of the offending State may not serve as a ground for denying refunds. The *Harper* Court rejected state fiscal interests in three different ways. First, in the face of arguments that " '[t]he fiscal implications of *Davis* for the [S]tates . . . are truly staggering' " (113 S. Ct. at 2535 (O'Connor, J., dissenting) (citation omitted)),[17] the Court held that *Davis* must be applied retroactively. 113 S. Ct. at 2518. Next, the Court specifically rejected Virginia's application of a state-law retroactivity doctrine which would have permitted consideration of its own fiscal interests,[18] stating: "[t]he Supremacy Clause . . . does not allow federal retroactivity

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[16] Several States have already followed California's lead in imposing disabling restrictions on the maintenance of class actions for tax refunds. *E.g.* Ind. Code Ann. §§ 6-6-1.1-910; 6-6-2.1-807 (enacted 1990); *id.* § 6-6-4.1-7.1 (1991); *id.* § 6-8.1-9-7 (1989); N.J. Stat. § 54:49-14 (1992) ("a refund claim on behalf of a class is not permitted"); S.C. Code Ann. § 12-47-447 (1991) (requiring tax commission to issue refund to only those similarly situated taxpayers "who properly have applied for a refund pursuant to the requirements of this chapter"). *See Dean v. State*, 250 Kan. 417, 423, 826 P.2d 1372, 1377, *cert. denied*, 112 S. Ct. 2941 (1992) (construing Kan. Stat. Ann. §§ 79-2005 & 74-2426 as precluding class remedy).

[17] Justice O'Connor noted that the States' estimated "total liability will exceed $1.8 billion." 113 S. Ct. at 2535.

[18] *See Harper v. Virginia Dep't of Taxation*, 241 Va. 232, 241-42, 401 S.E.2d 868, 873-74, *vacated*, 111 S. Ct. 2883 (1991) (state retroactivity doctrine considered, among other things, the State's "reliance on the old rule" and "the effect on the administration of justice of a retroactive application of the new rule") (citations omitted). Thus, the Virginia Supreme Court had justified its decision not to apply *Davis* retroactively in part on the ground that to do so would have a "potentially disruptive

doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Id.* at 2519. Finally, in light of *Harper*, the Court vacated and remanded for reconsideration the decisions of no fewer than five state courts, each of which had justified its refusal to award refunds on the ground of the fiscal burden that making refunds would impose on the offending State.[19]

2. *Harper* left open only *one* potential state-law basis for the denial of the refunds the retirees sought. The challenged tax being discriminatory rather than "beyond the State's power to impose" under any circumstances, "federal law [did] not *necessarily* entitle [the retirees] to a refund." *Id.* at 2519 (emphasis added). In particular, if state law offered aggrieved taxpayers the opportunity to challenge the contested tax before they paid it, then *due*

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and destructive impact on the Commonwealth's planning, budgeting and delivery of state services." 241 Va. at 240, 401 S.E.2d at 873.

[19] In *Sheehy v. Montana Dep't of Revenue*, 250 Mont. 437, 820 P.2d 1257, 1262 (1991), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993), refunds were denied in part because of "the financial burden on the citizens of the State of Montana." In *Swanson v. State*, 329 N.C. 576, 583, 407 S.E.2d 791, 794 (1991), *reh'g granted*, 330 N.C. 390, 410 S.E.2d 490 (1991), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993), the state court took "judicial notice of the fact that this State is in dire financial straits," and noted that the requested refunds would cost "approximately $140,000,000.00." The court in *Duffy v. Wetzler*, 174 A.D.2d 253, 265, 579 N.Y.S.2d 684, 691 (N.Y. App. Div. 1992), *cert. granted, vacated and remanded*, 113 S. Ct. 3027 (1993), believed that "the State should not be required to refund an estimated $44,000,000, particularly in today's parlous fiscal circumstances." And in *Cambridge State Bank v. James*, 480 N.W.2d 647, 654-55 (Minn. 1992), *cert. granted, vacated and remanded*, 113 S. Ct. 3026 (1993), refunds were denied on the basis of "the state's equitable interests," by which the court meant "its potential liability." *See also Bass v. State*, 302 S.C. 250, 256, 395 S.E.2d 171, 174 (1990), *cert. granted, vacated and remanded*, 111 S. Ct. 2881 (1991), *on remand*, 307 S.C. 113, 414 S.E.2d 110 (1992), *cert. granted, vacated and remanded*, 113 S. Ct. 3025 (1993) (refunds "would impose a severe financial burden on the State and its citizens [and] endanger the financial integrity of the State").

process was satisfied. *Id.* Because the availability of a predeprivation remedy posed an issue of state law which had "not been properly presented," the Court remanded the case to the Virginia court to rule on that limited issue. *Id.* at 2520.

The tax challenged in *Harper* did not directly invade the federal treasury,[20] and the issue of the relief owing the United States did not arise there. Even so, it is significant that the *only* possible basis for the refusal to refund the unlawful tax that *Harper* left open to Virginia was one that grew out of that State's leeway in remedying discriminatory taxation schemes. The States have *no* remedial discretion when the property or instrumentality they have taxed enjoys federal immunity, as is the case here. *Harper*'s holding that the dictates of the Supremacy Clause may not be evaded on the basis of state fiscal interests (113 S. Ct. at 2519) perforce bars the application of a fiscal-based state law like Section 19055 when its purpose and effect is to deny complete market relief to the United States.[21]

The Board offered only one interest behind the Section 19055 amendments it drafted in the wake of *Brown*: the State's fiscal interest in reducing the administrative cost of making refunds. This fiscal interest, however, does not justify the failure to make the market whole by awarding refunds to substantially all aggrieved investors. It is axiomatic that California's fiscal interest in retaining the ill-gotten tax proceeds themselves provides no defense. *McKesson*, 496 U.S. at 50 ("the State's interest in financial

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[20] *But see Davis*, 489 U.S. at 815 n.4 (observing that discriminatory tax exemption for state retirees has an *indirect* fiscal "impact on the Federal Government").

[21] In a case like *Harper*, the State's remedial obligations are delimited by the Due Process Clause. In a case like this one, however, the Supremacy Clause commands an offending State to provide market-relief to the United States no less than the Due Process Clause commands it to provide adequate refund procedures to individual investors. Thus, whether or not a State's failure to provide class-wide relief offends the due process rights of individual investors, it will offend the Supremacy Clause whenever it results in a failure substantially to relieve the market injury that the United States has suffered.

stability does not justify a refusal to provide [the] relief" that federal law requires). But it is no different, either in concept or in practical effect, to assert its fiscal interest in not spending the money that it will cost to *administer* the refund remedy. The administrative cost the Board sought to avoid arose out of its need in *Brown* to "[1] identify the class, [2] notify and correspond with class members, [3] evaluate their claims, and [4] ultimately issue refunds." App. at A-18.[22] But the Board must take the latter three of these four steps *whenever* it is required to refund an illegal tax.[23] The cost of taking those steps cannot be distinguished from the cost of providing the remedy, nor the refusal to take those steps distinguished from the refusal to provide the remedy.

If the *interest* California asserts in enforcing amended Section 19055 in this case is insufficient under the Supremacy Clause, so is the apparent *purpose* of that Section: to refund as little of the illegal tax proceeds as possible. The Board expects significantly lower administrative costs to result from the requirement that every individual seeking relief file his or her own notice of claim because tens of thousands of individuals secured the federally-guaranteed refund of unlawful tax payments when class-wide relief was granted in *Brown*, while only a handful will do so in the absence of such relief in this successor to *Brown*. But making a mere handful of refunds will not repair the injury that California has done to the federal treasury.

3. Had this Court's decision in *Harper* been available at the time this matter was before the court below, that court would have been constrained to decide the federal question differently. *See Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (remand for reconsideration appropriate

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[22] *See also Woosley*, 3 Cal. 4th at 791 (amendment to Section 19055 intended "to spare the state the substantial administrative costs associated with identifying and notifying class members").

[23] While the Board contended that the aggregate cost of *all* of these steps in *Brown* exceeded $1 million, there is no evidence that the first step by itself—identifying the taxpayers entitled to refunds—cost the Board significant labor or expense. *See* App. at A-18.

where intervening decision of this Court "shed new light on the law which, if it had been available at the time of the court of appeal['s] decision, might have led to a different result").[24]

Even before *Harper*, of course, this Court's supremacy-clause jurisprudence was clear that the state courts may not apply a state law—not even a "neutral procedural rule[]" (*Howlett v. Rose*, 496 U.S. 356, 372 (1990))—that will "thwart [a] congressional remedy" (*Felder v. Casey*, 487 U.S. 131, 139 (1988)) or that otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (citation omitted). *Felder* is particularly instructive: in a state court action brought under 42 U.S.C. § 1983, the Court concluded that Wisconsin's notice-of-claim statute was preempted because it "conflict[ed] in both its purpose and effects with the remedial objectives of § 1983." 487 U.S. at 138. The "purpose" of the notice-of-claim statute in *Felder* was to "impose conditions [on suits against Wisconsin municipalities] that 'assis[t] municipalities in controlling [the] costs'" concomitant to liability, such as "defense costs." *Id.* at 143. This Court unequivocally rejected that purpose:

> "The decision to subject [municipalities] to liability for violations of federal rights . . . is a decision that the State has no authority to override. Thus, however understandable or laudable *the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation* . . ." (*Id.* (emphasis added))

Felder's reasoning fits this case equally well: the sole purpose of California's notice-of-claim statute is to "control[] [the State's] liability expenses," and its practical effect is to deprive the United States of the remedy federal law provides for the injury that the unlawful tax has inflicted on its capital market.

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[24] The Iowa Supreme Court has already relied upon *Harper* in rejecting that State's attempt "to avoid its refund obligation by arguing the alleged inequity of imposing an onerous fiscal burden on the state . . . ." *Hagge v. Iowa Dep't of Revenue & Fin.*, 504 N.W.2d 448, 452 (Iowa 1993) (total liability of State exceeded $40 million).

Before *Harper*, however, the state courts regularly refused to apply *Felder*'s preemption analysis to state tax-refund procedures.[25] *Harper* now makes it clear that the Supremacy Clause carries no less force when it confronts a state tax-refund procedure designed to "control liability expenses" than in any other arena of state legislation, and that state fiscal justifications may no more trump a federal *tax* remedy than they may any other remedy federal law provides.

Section 19055's thinly-veiled disavowal of the federal market remedy is plainly invalid under *Harper* and *Felder* because it subordinates the fiscal interests of the United States to those of the State; it is nothing less than California's roundabout declaration of its "disagree[ment] with the content of federal law." *Howlett*, 496 U.S. at 379. The Supremacy Clause does not allow the fiscal interests of the United States to be supplanted by the invocation of state fiscal interests. *See Harper*, 113 S. Ct. at 2519. The application of Section 19055 in the court below has done precisely the same mischief as the state courts in *Harper, Sheehy, Swanson, Duffy, Cambridge,* and *Bass* attempted to do: it has defeated the remedy that federal law requires for unconstitutional state taxation on the basis of contrary state fiscal interests. The only significant difference between those cases and this one is that the federal interest here requires the State to provide relief not only to the individuals subjected to the unlawful tax, but also

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[25] *E.g., Hogan v. Musolf*, 163 Wis. 2d 1, 15, 471 N.W.2d 216, 221 (1991), *cert. denied*, 112 S. Ct. 867 (1992); *Nutbrown v. Munn*, 311 Or. 328, 337-43, 811 P.2d 131, 136-39 (1991), *cert. denied*, 112 S. Ct. 867 (1992); *Zarda v. State*, 250 Kan. 364, 372-73, 826 P.2d 1365, 1371-72, *cert. denied*, 112 S. Ct. 2941 (1992). *See also State v. Quill Corp.*, 500 N.W.2d 196, 202 (N.D.), *cert. denied*, 114 S. Ct. 173 (1993). These courts relied on *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), in which this Court held that principles of comity prevented *federal* courts from awarding state tax refunds where the State provided a "plain, adequate and complete" remedy. Stretching *McNary*'s rationale, and confusing the due process issue with the preemption issue, these courts concluded that *state* courts in actions for the refund of unconstitutional taxes could require the exhaustion of even those remedies which, under *Felder*'s analysis, would be preempted.

to the Federal Government's financial market, at the expense of which the State has enriched itself.[26] Because it is inconsistent with *Harper*, the decision below should not be permitted to stand.

4. Finally, the decision below is doubly offensive to the Supremacy Clause because the rule of state law on the basis of which it deprives the United States and its investors of their remedy is one that the State announced for the first time *after* it collected the unlawful tax. A state-law ground for the denial of a federal claim is impermissible as a matter of federal law when it originates in the context of the State's attempt to shield itself from liability on that very federal claim.

The Court in *McKesson* expressed precisely this point when it observed that a State may refuse to refund an unconstitutional tax to a taxpayer who has failed to comply with a notice requirement, provided that the requirement "was in effect at the time of [his or her] tax payments." 496 U.S. at 24 n.4. *See also id.* at 50 ("in the *future*, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invali-

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[26] Even before *Harper*, at least one state court had recognized its duty to provide class-wide refunds notwithstanding state-law barriers to a class-wide remedy. *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Cir. App. 1992), *writ quashed*, 611 So. 2d 1069 (Ala. 1993), was a *Davis*-type action seeking some $20 million in refunds. The trial court certified a class of retirees and granted relief. The Court of Civil Appeals affirmed, rejecting without discussion the argument of the revenue commissioner that class actions against the State were barred by Section 14 of the Alabama Constitution. After hearing oral argument, the Alabama Supreme Court quashed its writ of *certiorari* as improvidently granted. 611 So. 2d at 1070. The lone dissent, framing the issue as whether the Supremacy Clause stood in the way of the enforcement of the Alabama Constitution (*id.* at 1071), argued that it did not. *Id.* at 1074. ("The mere fact that the state did not provide a class action procedure to challenge this income tax . . . does not make the state tax procedures constitutionally inadequate" under federal law). The result was that Alabama was required to provide the federal remedy on a class-wide basis in the face of a formidable state-law obstacle—its state constitution—even though its unlawful tax had no direct impact on the federal treasury.

dation") (emphasis added). While *McKesson* upheld the taxpayer's right to a "backward looking" remedy on due process grounds (*id.* at 51-52), its dictum on retroactive procedures stems, at least in part, from the Supremacy Clause. Due process is not offended by retroactive state tax legislation reasonably imposed. *E.g. Welch v. Henry*, 305 U.S. 134, 146 (1938) (citing *Milliken v. United States*, 283 U.S. 15, 21 (1931)). But the Supremacy Clause is peculiarly implicated when a *State* imposes a rule that is specifically intended to restrict a *federal* tax remedy. This is all the more so when that federal remedy is intended to provide relief for an injury to the United States itself.

At the time that the tax here at issue was collected—1982 through 1985—it was well settled as a matter of California law that administrative claims could be filed by a single claimant on behalf of an absent class.[27] The Board concedes that its motive in proposing legislation to change this rule was nothing more nor less than a desire to escape the expense to which it had been put in making refunds of the unconstitutional tax it had collected between 1978 and 1981. App. at A-17 - A-18. The California Legislature enacted the Board's amendment, making it effective in 1986. The court below then applied the amended statute as the basis for denying class relief to taxpayers from whom the Board had collected the unconstitutional tax in the four tax years *prior* to 1986. Because the amended statute was not "in effect at the time of [the] tax payments" the class seeks to recover (*McKesson*, 496 U.S. at 24 n.4), it may not be applied in this action. California may not evade "the force of the Supremacy Clause" (*Howlett*, 496 U.S. at 382-83) by imposing this new state-law obstacle with the express purpose of frustrating the market relief that federal law requires.

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[27] *E.g. City of San Jose v. Superior Court*, 12 Cal. 3d 447, 454-58, 525 P.2d 701, 115 Cal. Rptr. 797 (1974); *Schoderbek v. Carlson*, 113 Cal. App. 3d 1029, 1033-37, 170 Cal. Rptr. 400 (1980); *Lattin v. Franchise Tax Bd.*, 75 Cal. App. 3d 377, 380-83, 142 Cal. Rptr. 130 (1977); *Santa Barbara Optical Co. v. State Bd. of Equalization*, 47 Cal. App. 3d 244, 247-51, 120 Cal. Rptr. 609 (1975).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: November 12, 1993.

Respectfully,

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FILED

APR 22, 1993

Court of Appeal—First App. Dist.

By RON D. BARROW
Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DONALD E. FARRAR et al.,
Plaintiffs and Appellants,

v.

FRANCHISE TAX BOARD
Defendant and Respondent.

A056762

(San Francisco Super. Ct. No. 890858)

Revenue and Taxation Code[1] section 19055 provides that an administrative claim for refund of income taxes when "filed for or on behalf of a class of taxpayers shall do all of the following: [¶] (a) Be accompanied by written authorization from each taxpayer sought to be included in the class. [¶] (b) Be signed by each taxpayer or taxpayer's authorized representative. [¶] (c) State the specific grounds on which the claim is founded."

This appeal from an order refusing to certify a class action seeking a judicial refund of taxes collected by the Franchise Tax Board (Board) presents the issue of whether section 19055 means what it says. We hold that it does and that it is to be enforced on

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[1] Subsequent statutory references are to this Code unless otherwise indicated.

that basis. We further hold that would-be representatives who fail to take section 19055 at face value cannot invoke the doctrine of substantial compliance otherwise applicable to class actions.

BACKGROUND

In a very real sense, it all began with Sandra Brown. It was she who in the early 1980s instituted a class action for refund of income taxes the Board had assessed and collected on dividends paid to class members by a trio of mutual funds for the tax years 1978, 1979, 1980, and 1981. She claimed that the Board had no power to tax the dividends because they derived from—and thus in legal effect were-nontaxable obligations of the federal government. The trial court sustained this claim, certified the class, and ordered the Board to provide notice to the members of the class identified from the funds' records.

Approximately 40,000 claims were received and allowed by the Board. The ensuing judgment ordering refunds of almost $6 million plus substantial interest was affirmed by this court in December of 1987. (*Brown v. Franchise Tax Bd.* (1987) 197 Cal.App.3d 300.)[2]

Several very relevant events occurred during the pendency of the *Brown* litigation. First, having incurred extraordinary and unanticipated expenses of more than $1 million, the Board drafted amendments to section 19055 which the Legislature enacted and which became effective in September of 1986.[3] (See note 8,

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[2] Our affirmance also reached the procedure established by the trial court to deal with the 3,000 or so disputed claims disallowed by the Board.

[3] Prior to the amendment section 19055 provided: "Every claim for refund shall be in writing and shall state the specific grounds upon which it is founded." (See Stats. 1945, ch. 645, § 110, p. 1289.)

After amendment section 19055 now provides: "Every claim for refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds upon which it is founded. A claim filed for or on behalf of a class of taxpayers shall do all of the following: [¶] (a) Be accompanied by

post.) Second, in April of the following year, the administrative preliminaries to this case commenced when plaintiffs Donald and Joan Farrar filed a joint claim for refund of taxes they paid on dividends from the same three funds involved in *Brown*; plaintiffs' claim picked up where Sandra Brown's claim ended—with the tax year 1982—and extended through the three succeeding years. Mr. Farrar purported to make the claim as a class representative for all persons who paid California income tax on the dividends from the funds.

Hearing nothing from the Board, plaintiffs deemed their claim disallowed (see § 19085) and commenced this action in April of 1988. Plaintiff Donald Farrar identified himself in the complaint as suing "individually and on behalf of all others similarly situated." Plaintiffs alleged that the Board's continued collection of tax on dividends from federal government obligations violated a host of state and federal constitutional and statutory provisions. The Board's silence ended in late June of 1988—about the time our decision in *Brown* became final—when it answered plaintiffs' complaint and asserted for the first time that plaintiffs' administrative claim did not comply with section 19055.

Plaintiffs thereafter submitted five "supplements" to their administrative claim with more than 600 written authorizations from other taxpayers purporting to designate plaintiffs to prosecute the action on their behalf. The Board responded by informing plaintiffs in effect that (1) exclusive jurisdiction over plaintiffs' claim was now with the court[4] (2) the authorizations were invalid because they had not been filed with, and "cannot retroactively cure the defects" in plaintiffs' administrative claim, and (3) each of the authorizations was "considered to be a new

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written authorization from each taxpayer sought to be included in the class. [¶] (b) Be signed by each taxpayer or taxpayer's authorized representative. [¶] (c) State the specific grounds on which the claim is founded." (Stats. 1986, ch. 931, § 4, p. 3225.)

[4] The Board stated that it was nevertheless "subject to the court's approval, . . . willing to grant the claims of Donald E. and Joan F. Farrar, *as individuals*, but not as representatives of any class, for refund of tax paid on distributions" from two of the funds. (Original emphasis.)

claim" that was untimely because "[t]he limitations period for filing such claims, prescribed by . . . Section 19053, has expired."

Plaintiffs then moved for certification of a class and two subclasses defined so as to "include all [individual and corporate] investors who paid California tax on distributions from the Funds in the relevant years irrespective of whether the investors brought individual claims for refunds."[5] The trial court denied the motion, concluding that "plaintiffs have failed to meet the class claim filing requirements of . . . Section 19055" and "in view of that statute, and how specific it is, there was not substantial compliance."

Plaintiffs perfected a valid appeal from the formal order denying their motion.[6]

REVIEW

Both sides have throughout this litigation received exceptionally competent representation. Fresh from her triumph in *Brown*, plaintiff's counsel is understandably anxious to achieve a similar victory by establishing that the investment dividends on her actual and putative clients are beyond the Board's taxable domain. That far we need not go, for the dispositive issues on this appeal are purely procedural.

The progression of plaintiffs' arguments runs as follows: First, relying on the proposition stated by our Supreme Court that administrative claims statutes were not intended to "thwart class relief" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457), plaintiffs urge that section 19055 be given a construction that will avert such a result. Second, they submit that section 19055 and 19085 should not be read as permitting the Board to

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[5] Plaintiffs advised the trial court that the anticipated size of the class could be as high as 90,000.

All of the taxpayers identified in the supplements to plaintiffs' refund claim before the Board were individuals.

[6] The order is appealable. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

"sandbag" the unwary by waiting until the administrative process is concluded and judicial proceedings begun before raising a defect in the form of the administrative claim. Third, they contend that the class claim they filed with the Board should be treated as adequate for purposes of section 19055 by application of the doctrine of substantial compliance adopted in *City of San Jose* and subsequent decisions. Finally, plaintiffs urge that ratification of the construction given section 19055 by the Board and the trial court would allow a taxing practice prohibited by federal law (31 U.S.C. § 3124) and our *Brown* decision to go unchecked, thereby violating the Supremacy Clause of article VI of the United States Constitution.

The well-known advantages of the class action are convenience, efficiency, and completeness. (E.g., *Richmond v. Dart Industries, Inc., supra,* 29 Cal.3d 462, at p. 469; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-808.) Its general but limited codification in Code of Civil Procedure section 382[7] notwithstanding, the class action retains the essence of its origins as an invention of equity. (*See City of San Jose v. Superior Court, supra,* 12 Cal.3d 447 at pp. 458, 463; *Hansberry v. Lee* (1940) 311 U.S. 32, 41; *Supreme Tribe of Ben-Hur v. Cauble* (1921) 255 U.S. 356, 363, 366; Note, *Class Actions and Interpleader: California Procedure and the Federal Rules* (1953) 6 Stan. L. Rev. 120, 121-123.) Our Supreme Court has reinforced this heritage by urging trial courts to adopt flexible and innovative procedures from common law sources and analogous statutes. (*See Richmond v. Dart Industries, Inc., supra,* at pp. 469-470, fn. 7; *Vasquez v. Superior Court, supra,* at pp. 820-821.)

In light of the fact that the class action remedy continues to be essentially equitable in nature, and given that equity will defer to statute, the common law features of class action administration are subject to legislative displacement. (*See City of South San*

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[7] Whose relevant language provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (See also Civ. Code, § 1781.)

Francisco v. Cypress Lawn Cemetery Assn. (1992) 11 Cal.App.4th 916, 922-923; *Johnson v. Tago, Inc.* (1986) 188 Cal.App.3d 507, 518.) Section 19055 is a statute that is recent in origin, unambiguous in phrasing, and specific in the scope of its application. It therefore is to be accepted as stating the governing rule of decision and to be applied according to its plain language. (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.)

That plain language does not evidence any legislative intent to thwart class relief for tax refunds. On the contrary, section 19055 reflects the Legislature's express sanction for class actions. All that section 19055 does is establish conditions to the availability of that remedy. With the exception of their Supremacy Clause argument, plaintiffs raise no challenge to the Legislature's power to impose such conditions.

Plaintiff's second point requires that section 19055 be considered in conjunction with section 19085, which provides in pertinent part: "If the . . . Board fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and bring an action against the . . . Board on the grounds set forth in the claim for recovery of the whole or any part of the amount claimed . . . ."

Section 19085 is obviously designed to provide a measure of certainty and protection to both taxpayers and the Board. By requiring the taxpayer to state the grounds for a refund claim, section 19085 gives the Board notice of the claim and the underlying substantive reasons. If, for whatever reason, the Board takes no action on the claim, the Board knows what it will confront if the taxpayer initiates a judicial action for a refund. On the other hand, the taxpayer is given a clear timetable for commencing judicial action instead of endlessly wondering if an administrative refund claim has been lost down a bureaucratic rathole. (Cf. *Shell Western E & P, Inc. v. County of Lake* (1990) 224 Cal.App.3d 974, 984-985.)

Plaintiffs appear to believe that section 19085 somehow obliges the Board to notify a taxpayer of any defect in the form of an

administrative claim in order to preserve the defect as an issue in subsequent court action. In other words, the Board is not required to respond to the substantive merits of the claim but, on penalty of forfeiting the issue, the Board is required to point out defects in the form of the claim. This conjures up the bewildering possibility of the Board telling a taxpayer "Your claim is not in the correct form, but don't assume that our telling you about this problem means we will make a decision on your claim if you correct the problem."

Any possible merit to plaintiffs' position is obliterated by the indisputable fact that plaintiffs made no real attempt to comply with section 19055 until after they commenced this action, which was 17 months after the amended version of that statute took effect. For 12 of those 17 months plaintiffs were represented by counsel who would have particular reason to know that section 19055 had been amended, because it was that counsel's success in the Brown litigation which was a proximate cause of the statute's revision. Actual as well as imputed or constructive knowledge is shown by plaintiffs' identifying their administrative claim as being on behalf of a class, a requirement of the amended section 19055 not present in its original form. (See note 3, *ante.*) But beyond this plaintiffs made not even a perfunctory effort to comply with the more detailed requirements specified by section 19055 for a class claim.

Plaintiffs' argument that something akin to a waiver or estoppel results from the Board not invoking section 19055 earlier is also defeated by constitutional considerations. Article XIII, section 32 of the California Constitution specifies that "After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." In light of our Supreme Court's acceptance that this provision "means what it says" (*Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 284), courts of appeal have held that they "are without authority to alter the statutory procedures for tax refunds enacted by the Legislature pursuant to the . . . command of article XIII, section 32." (*Shiseido Cosmetics (America) Ltd. v. Franchise State Bd.* (1991) 235 Cal.App.3d 478, 486-489; accord *Masi v. Nagle*

(1992) 5 Cal.App.4th 608, 611-612; *Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1214.)

The recent validation of this approach by our Supreme Court dooms plaintiffs' third argument—that their purported class action may go forward under the substantial compliance doctrine of *City of San Jose v. Superior Court, supra,* 12 Cal.3d 447. There the Court held that to satisfy the administrative claim provision of the Government Torts Claims Act (Gov. Code, § 810 et seq., esp. § 910) "the class claim must provide . . . specified information concerning the representative plaintiff and then sufficient information to identify and make ascertainable the class itself. . . . Beyond this, the sufficiency of the identifying information must be measured by the substantial compliance test." (*City of San Jose v. Superior Court, supra,* at p. 457 [original emphasis omitted].) A number of Court of Appeal decisions extended this reasoning to class claims for tax refunds. (See e.g., *Schoderbek v. Carlson* (1980) 113 Cal.App.3d 1029; *Lattin v. Franchise Tax Board (1977) 75 Cal.App.3d 377; Santa Barbara Optical Co. v. State Bd. of Equalization* (1975) 47 Cal.App.3d 244.) This trend was halted in *Woosley v. State of California* (1992) 3 Cal.4th 758.

Woosley involved a class action challenging the imposition of certain license fees and use taxes. Woosley filed an administrative refund claim on behalf of himself and all others similarly situated. The claim was denied, whereupon Woosley commenced a successful class action for refund. On its own initiative the Supreme Court raised and considered the issue of the adequacy of the class claim, concluding that the substantial compliance portion of *City of San Jose* "should not be extended to include claims for tax refunds." (*Woosley v. State of California, supra,* 3 Cal.4th 758 at pp. 788-789.)

With respect to the statute governing use tax refund claims, the Court stated: "When Woosley filed his claim in 1977, section 6904 read: 'Every claim shall be in writing and shall state the specific grounds upon which the claim is founded.' In 1987, approximately 10 years after Woosley filed his claim, the Legislature amended section 6904 to add the following language . . . : 'A claim filed for or on behalf of a class of taxpayers shall do all of the following: [¶] (1) Be accompanied by written authorization

from each taxpayer sought to be included in the class. [¶] (2) Be signed by each taxpayer or taxpayer's authorized representative. [¶] (3) State the specific grounds on which the claim is founded.' (Stats. 1987, ch. 38, Section 5, p. 101.) [¶] The statute as amended in 1987 expressly permits, for the first time, the filing of a class claim, but requires that each member of the class authorize his or her inclusion in the class and that each member of the class, or the class member's authorized representative, sign the claim. A class claim for refund of sales and use taxes may not be submitted, as it was in the present case, without the knowledge and express consent of each member of the class." (*Woosley v. State of California, supra,* 3 Cal.4th 758 at p. 791.) Noting that in 1986 "the Legislature had amended section 19055, governing claims for refunds of personal income taxes, and section 26074, governing claims for refunds of bank and corporate taxes, to add language nearly identical to that later added to section 6904," the Court construed these amendments as evidencing the Legislature's aim "to allow a narrowly circumscribed form of class claims," specifically, "only those class claims where each member of the class expressly authorizes and signs the claim."[8] (*Id.* at pp. 791-792.) Disapproving the line of Court of Appeal decisions allowing class claims, the Court concluded that "article XIII, section 32 of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Id.* at p. 792.)

Plaintiffs argue in a supplemental brief that *Woosley*—which was decided during the pendency of this appeal—is dicta on the issue of the construction of section 19055. Strictly speaking, plaintiffs may be correct. But as *Woosley* did construe a statute characterized as "nearly identical" to section 19055, the discussion of the *in pari materia* section 6904 is clearly germane for present purposes. (See *In re Phyle* (1947) 30 Cal.2d 838, 845; *Security Pacific Nat. Bank v. Casavant* (1988) 205 Cal.App.3d

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[8] The Court further noted that these amendments "were intended to spare the state the substantial administrative costs associated with identifying and notifying class members once a case had been certified as a class action." (*Woosley v. State of California, supra,* 3 Cal.4th 758 at p. 791.)

127, 130.) If *Woosley* is dicta, it has an especially muscular nature and relevancy. The lesson of *Woosley* we take to be that statutes governing administrative tax refund procedures, backed as they are by a plenary constitutional authority, are to be strictly enforced.[9] (See also *Barclays Bank Internat. Ltd. v. Franchise Tax Bd.* (1992) 10 Cal.App.4th 1742, 1749.)

In any event, the Court has held that the doctrine of substantial compliance kicks in only after the aspiring class representative plaintiff establishes "*some* compliance with *all* of the statutory requirements." (*City of San Jose v. Superior Court, supra,* 12 Cal.3d 447 at pp. 456-457 [original emphasis].) By any stretch of the imagination, plaintiffs cannot demonstrate any pretense of timely compliance with the written authorizations requirement section 19055 demands of all members of a class refund claim. The inescapable consequence of plaintiffs' noncompliance is that their administrative claim was, and their refund action is, valid only as to them in their individual capacities. (See *Woosley v. State of California, supra,* 3 Cal.4th 758 at p. 788.)

Plaintiff's final argument looks to avoid all of the foregoing by interposing the Supremacy Clause. Again, plaintiffs are looking ahead to the merits of their substantive attack on the tax. As we have just concluded, plaintiffs are properly in court and able to make that attack on their own behalf. But insofar as they are forced to go it alone, they are not aggrieved or hindered in that quest by the absence of a class behind them. (Cf. *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) Nothing in the Supremacy Clause requires them to be generals at the head of an army. Moreover, the United States Supreme Court has held that a state may, consistent with constitutional demands, ensure its "exceedingly strong interest in financial stability" by enacting a variety of procedural protections, among which are "timely notice

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[9] As this court has particular reason to know, two months after *Woosley* the Supreme Court made it clear that it takes an equally dim view of attempts by the state to avoid strict compliance with the administrative machinery established by statute to consider refund claims. (See *Title Ins. Co. v. Bd. of Equalization* (1992) 4 Cal.4th 715, 729-730.)

of complaint" provisions and "relatively short statutes of limitations." (*McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18, 37, 45.) This is the net effect of the provisions considered here; plaintiffs did not provide timely notice of a class claim in compliance with section 19055, and, when they took advantage of section 19085 to go into court, they deprived themselves of the ability to correct any defects in their administrative claim.

In sum, the trial court correctly recognized that plaintiffs had not complied with the plain language of section 19055, and that no federal constitutional consideration existed to enforcing compliance with that plain language. Denial of plaintiffs' certification motion was therefore not error.

The order is affirmed.

Perley, J.

We concur:

Anderson, P.J.

Reardon, J.

FILED

San Francisco County Superior Court

Feb. 18, 1992

Mita Money, Clerk

By Rob Suma
Deputy Clerk

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Attorneys for Defendant
Franchise Tax Board

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

DONALD E. FARRAR,
individually and on behalf of all others similarly situated, et al.,
Plaintiffs,

v.

FRANCHISE TAX BOARD,
Defendant.

No. 890858

CLASS ACTION

ORDER DENYING MOTION TO CERTIFY CLASS

The matter of Plaintiffs' Second Motion to Certify Class and Resolve Class Issues filed herein, came on regularly for hearing in the above-entitled Court on January 24, 1992, before the Honorable Lucy McCabe.

The Court having read and considered all of the pleadings and evidence before it and the argument of counsel, the Court finds that plaintiffs have failed to meet the class claim filing requirements of Revenue and Taxation Code Section 19055. The Court further finds that the evidence submitted by Plaintiffs does not support their theory of equitable estoppel.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the the [sic] Plaintiffs' Second Motion to Certify Class and Resolve Class Issues is denied.

DATED: February 14, 1992.

/s/ Lucy Kelly McCabe
Judge of the Superior Court

/s/ Elizabeth S. Salveson

Approved as to form:

ELIZABETH SALVESON
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK

Attorneys for Plaintiffs

FILED

San Francisco County Superior Court

NOV 13, 1990

Donald W. Dickinson, Clerk

BY Jennifer Musk
DEPUTY CLERK

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER NINE

DONALD E. FARRAR,
individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Franchise Tax Board,
Defendant

No. 890-858

ORDER DENYING MOTION
TO CERTIFY CLASS

Plaintiffs' motion to certify class and to resolve class issues, heretofore submitted, is denied without prejudice.

November 9, 1990

/s/ Ira A. Brown
IRA A. BROWN, JR.
Judge of the Superior Court

SUPREME COURT

FILED

July 15, 1993

Robert Wandruff Clerk
DEPUTY

First Appellate District, Division Four, No. A056762
S033112

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

DONALD E. FARRAR Et Al.,
Appellants

v.

FRANCHISE TAX BOARD,
Respondent

Appellants' petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

Supreme Court of the United States

No. A-304

Donald E. Farrar, et ux.,
Petitioners

v.

Franchise Tax Board

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 12, 1993.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of October, 1993.

FILED
San Francisco County Superior Court
AUG 13, 1990
Donald W. Dickinson, Clerk
BY S. Douglas
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

DONALD E. FARRAR,
Individually and on behalf of all others similarly situated, et al.,
Plaintiffs,

v.

FRANCHISE TAX BOARD,
Defendant.

No. 890858

CLASS ACTION

DECLARATION OF DAVID HINMAN IN OPPOSTION TO MOTION TO CERTIFY CLASS AND TO RESOLVE CLASS ISSUES

Date: Sept. 24, 1990
Time: 9:30 a.m.
Dept.: 9 (Room 457)
Judge: Ira A. Brown

I, DAVID HINMAN, declare as follows:

1. I am a Senior Staff Counsel, Specialist for the Franchise Tax Board (Board).

2. I coordinated the department's efforts in *Brown v. Franchise Tax Board* (S.F. Superior Court No. 803759).

3. In the course of resolving the class action against the Board in *Brown,* the Board was required to expend an extraordinary amount of administrative effort and expense (which was not